

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

APPROXIMATELY \$44,888.35 IN  
U.S. CURRENCY, et al.,

Defendants.

CIV-S-04-0204 DFL DAD

MEMORANDUM OF OPINION  
AND ORDER

This civil forfeiture action arises out of the criminal investigation and prosecution of Scott Poll and his company, Red Rock, LLC ("Red Rock"), for a scheme to defraud cable operators by selling illegal cable descramblers. The United States seeks forfeiture of approximately \$44,888.35 in funds seized on December 3, 2003 ("defendant funds") from one of Red Rock's bank accounts. North American Bancard ("NAB") filed a verified claim to a portion of the defendant funds, which the government now moves to dismiss. For the following reasons, the court GRANTS the government's motion to dismiss.

I.

1 The defendant funds were seized on December 3, 2003 pursuant  
2 to a federal seizure warrant. (Mot. at 3.) The government  
3 alleges that the defendant funds represent the proceeds of  
4 specified unlawful activity and are, therefore, subject to civil  
5 forfeiture under 18 U.S.C. § 981(a)(1)(C). (Id.) Specifically,  
6 the government contends that the defendant funds are the proceeds  
7 of the sale of cable descramblers, often purchased over the  
8 internet by individuals using a credit card. (Id. at 2-3.) The  
9 government also alleges that the funds were involved in, or  
10 traceable to, violations of 18 U.S.C. § 1956(a)(1)(A)(I) (money  
11 laundering) and are, therefore, subject to civil forfeiture under  
12 18 U.S.C. § 981(a)(1)(A).

13 NAB has filed a verified claim to \$35,239.89 of the  
14 defendant funds. NAB is a third-party intermediary for merchants  
15 who are accepted into, and participate in, Global Payment  
16 Direct's ("Global") credit card program affiliated with HSBC Bank  
17 as a member of VISA USA and/or MasterCard International, Inc.  
18 (Opp'n at 1.) It is in this capacity that NAB interacted with  
19 Red Rock, which was a merchant accepted into Global's credit card  
20 program.

21 The basic credit card processing system works as follows.  
22 When a customer purchases a product from a merchant, such as Red  
23 Rock, with a credit card, the merchant submits these charges to  
24 Global for payment. (Id. at 2.) In response, Global places  
25 funds directly into the merchant's, in this case Red Rock's, bank  
26

1 account.<sup>1</sup> The charges are then reported on the statements of the  
2 individual cardholder as monies owed for charges incurred.

3 As part of its role in this system, NAB markets Global's  
4 credit card purchasing services to merchants, helping to pre-  
5 screen and sign-up new applicants. (Id. Ex. A at 1.) Once  
6 Global has accepted a merchant into its credit card processing  
7 program, NAB provides various customer services to the merchant  
8 and assists in collecting amounts owed to Global. (Id. Ex. A at  
9 2-3.) Critical to this motion, NAB also plays an important role  
10 in resolving "chargebacks," which occur when a cardholder  
11 disputes a charge.

12 Specifically, when a cardholder informs Visa, MasterCard,  
13 and/or Global of a dispute over an unauthorized or otherwise  
14 improper charge, Global conducts an investigation of the  
15 cardholder's claim. (Opp'n at 2.) If the chargeback is  
16 substantiated, Global reimburses the cardholder. (Id.) Once  
17 Global reimburses the cardholder, it deducts the chargeback  
18 amount from its payments to NAB and assigns NAB its right to  
19 pursue collection of the chargeback from the merchant. (Reply at  
20 13-14; NAB's Verified Claim ¶ 4; Opp'n Ex. A at ¶ B.3-4.) Upon  
21 the assignment of Global's collection rights, NAB has the right  
22 under the contract with the merchant to directly debit or  
23 withdraw the chargeback amount from the merchant's bank accounts.

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25 <sup>1</sup> In its papers, NAB stated that it, not Global, placed the  
26 money in the merchant's account upon submission of credit card  
charges. (Id. Ex. C at ¶ 5.) However, at the hearing on this  
matter, NAB's counsel clarified that Global initially paid the  
money into the merchant's account, not NAB.

1 (Opp'n at 3.) Merchant authorization is not required for this  
2 debit/deduction. (Id.)

3 As a result of the government's seizure of the funds in Red  
4 Rock's bank account, NAB was unable to collect from Red Rock  
5 \$35,239.89 to cover chargebacks from cardholders who had  
6 purchased descramblers from Red Rock. In these cases, the  
7 cardholder purchased the descrambler prior to the seizure.  
8 However, during the time that elapsed for the processing and  
9 assignment of these chargebacks to NAB by Global, the government  
10 seized the funds in Red Rock's account, leaving NAB unable to  
11 collect from Red Rock. (Id. Ex. E.) The reasons for the  
12 chargebacks varied, including claims that: (1) that the charges  
13 were unauthorized; (2) the goods were defective; (3) the  
14 merchandise was not as described; (4) the product was returned;  
15 or (5) the cardholder never received the product. (Id.)

16 On November 18, 2004, NAB filed a verified claim to  
17 \$35,239.89 of the defendant funds. The government moves to  
18 dismiss or, in the alternative, strike NAB's verified claim on  
19 two grounds: (1) NAB lacks standing to bring such a claim; and  
20 (2) NAB does not qualify as an "innocent owner" within the  
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1 meaning of 18 U.S.C. § 983(d).<sup>2</sup>

2 II.

3 A. Article III Standing

4 "In a forfeiture case, a claimant's Article III standing  
5 turns on whether the claimant has a sufficient ownership interest  
6 in the property to create a case or controversy. This threshold  
7 burden is not rigorous." See United States v. \$4,224,958.57, 392  
8 F.3d 1002, 1005 (9th Cir. 2004) (hereinafter "Boylan") (quoting  
9 United States v. One Lincoln Navigator, 328 F.3d 1011, 1013 (8th  
10 Cir. 2003)). "A claimant need not prove the merit of his  
11 underlying claim. He must, however, be able to show at least a  
12 facially colorable interest in the proceedings sufficient to  
13 satisfy the case-or-controversy requirement." United States v.  
14 \$9,041,598.68, 163 F.3d 238, 245 (5th Cir. 1998). Creditors who  
15 lack a secured interest in the specific property subject to  
16 forfeiture do not have sufficient ownership interest to contest  
17 the forfeiture of the property.<sup>3</sup> United States v. \$20,193.39 U.S.  
18 Currency, 16 F.3d 344, 346-47 (9th Cir. 1994).

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20 <sup>2</sup> Although the government brings this motion as a motion to  
21 dismiss, NAB has submitted material in opposition to the motion  
22 beyond the scope of its verified complaint. In light of these  
23 submissions, the court treats the government's motion as one for  
24 summary judgment. Fed.R.Civ.P. 12(c); see Olsen v. Idaho State  
Bd. of Med., 363 F.3d 916, 922 (9th Cir. 2004) (stating that  
where party opposing summary judgment submits outside evidence,  
the court may convert the motion to dismiss into a summary  
judgment motion without providing further notice to the party).

25 <sup>3</sup> NAB argues that it need not have a perfected security  
26 interest in the specific assets to establish Article III  
standing. (Opp'n at 10-11.) However, as stated above, this  
argument is at odds with established Ninth Circuit precedent.

1 NAB asserts an interest in these funds based upon two  
2 theories: (1) under its contract with Red Rock and Global, it  
3 retains actual ownership of the funds deposited into Red Rock's  
4 account; and (2) it is the beneficiary of a constructive trust  
5 imposed on the defendant funds. However, neither theory is  
6 persuasive.

7 1. Contractual Ownership Theory

8 NAB argues that, under the terms of the merchant service  
9 agreement ("MSA") entered into between Global, NAB, and Red Rock,  
10 it retained ownership of the funds deposited into Red Rock's bank  
11 accounts until the time for customers to assert a chargeback  
12 request expired. (Opp'n at 9-10.) Specifically, NAB argues that  
13 the MSA grants NAB the unfettered right to directly debit or  
14 withdraw the charged-back funds from the merchant's account.  
15 (Id. at 3.) Implicit in this right to automatically debit, NAB  
16 argues, is the corresponding obligation of the merchant to hold  
17 the deposited funds in the account until the chargeback period  
18 expires. (Id.) NAB claims that "[i]t is universally recognized  
19 in the industry that funds deposited into the merchant's account  
20 in response to credit card charges do not belong to Red Rock  
21 until the chargeback process cleared" and that NAB remains the  
22 true owner of these funds until that time. (Id. Ex. C at ¶¶ 8,  
23 10.)

24 NAB's argument finds no support in the terms of the MSA  
25 agreement. The contractual terms make no mention of any  
26 obligation by Red Rock to hold specific funds in its account

1 until the chargeback period expires. Nor do they suggest that  
2 NAB retains ownership of the funds deposited into Red Rock's  
3 account. Rather, the language speaks of Red Rock's obligation to  
4 "pay" Global/NAB the full chargeback amount and states that  
5 chargebacks are "charged to" the merchant's account. (Id. Ex. B  
6 at ¶¶ 5, 14.) This suggests that when NAB places the funds in  
7 Red Rock's account, Red Rock becomes the owner of these funds and  
8 NAB/Global merely retains a right to recoup from Red Rock's  
9 account any chargebacks incurred.

10 This reading of the contract is buttressed by a comparison  
11 with the optional reserve account provision in the agreement.  
12 (Id. ¶ 15.) If a reserve account is established, the MSA grants  
13 Global/NAB a secured interest in the account, which allows  
14 Global/NAB to withdraw funds as it deems necessary and provides  
15 that any funds in the reserve account may be held until the  
16 expiration of any potentially applicable chargeback period.  
17 (Id.) This contractual language indicates that if NAB wanted to  
18 obligate Red Rock to hold specific funds until certain  
19 chargebacks cleared and, thereby, acquire something akin to a  
20 secured interest in the specific funds, a reserve account was  
21 necessary. NAB does not claim that the defendant funds were held  
22 in such an account.<sup>4</sup>

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24 <sup>4</sup> NAB makes reference to industry policy and custom in  
25 support of its contractual theory. However, evidence of usage or  
26 custom in the trade is inadmissible to control, vary, or  
contradict express terms of the contract. Fireman's Fund Ins.  
Co. v. Mercer Marine Transit Corp., 136 Ga.App. 621, 621-22, 222  
S.E.2d 138 (Ga.App. 1975); Varni Bros. Corp. v. Wine World, Inc.,  
35 Cal.App.4th 880, 889, 41 Cal.Rptr.2d 740 (1995). If, as NAB

1 At most, then, the MSA gives NAB a secured interest in the  
2 Red Rock account from which the defendant funds were seized, but  
3 not in the actual funds. This is a critical distinction because  
4 the defendant in this case is not the Wells Fargo account, but  
5 the specific funds in the account. See United States v.  
6 Bornfield, 145 F.3d 1123, 1136 n.7 (10th Cir. 1998) (noting that  
7 bank account merely holds the property that is subject to  
8 forfeiture). Thus, even if NAB has a secured interest in the  
9 Wells Fargo account, it has not established an ownership interest  
10 in the specific funds in the account. See United States v.  
11 Approximately \$178,000.00, CIV-S-03-0640 (E.D. Cal. Jan. 27,  
12 2004) (finding that bank which held general right to  
13 reimbursement did not establish a particular claim to the actual  
14 funds in the customer account).

15 Additionally, under the contract, any ownership right or  
16 interest of NAB in the funds did not arise prior to the seizure.  
17 According to the terms of the MSA, NAB's contractual right to  
18 debit the account arose when it became obligated to pay certain  
19 chargebacks and credit losses to Global. (Opp'n Ex. C. at ¶ 9.)  
20 However, NAB did not become obligated to pay the chargebacks in  
21 question until after the government had seized the defendant  
22 funds. (Id. Ex. E.) Therefore, NAB's right to withdraw the  
23

24 argues, there is an implied obligation under industry standards  
25 to hold the funds, that obligation would apply to all Red Rock  
26 accounts, not simply reserve accounts. This would make the  
express provisions of the reserve account clause unnecessary.  
Moreover, NAB's evidence in support of such a policy - one  
declaration from an NAB employee - is weak. Accordingly, NAB's  
reference to industry policy and custom also fails.



1 funds from Red Rock's account did not ripen until after the  
2 seizure and, as a result, it cannot make a specific claim to the  
3 defendant funds.<sup>5</sup> See United States v. BCCI Holdings  
4 (Luxembourg), S.A., 980 F.Supp. 10, 14-15 (D.D.C. 1997) (holding  
5 that bank with unexercised, inchoate right of set-off against  
6 defendant's account does not have standing to contest forfeiture  
7 of funds from that account).

8 For the above reasons, the MSA does not provide NAB standing  
9 to contest the forfeiture of the defendant funds.

## 10 2. Constructive Trust Theory

11 As an alternative argument, NAB claims standing based on a  
12 constructive trust theory, relying heavily on the Ninth Circuit's  
13 opinion in Boylan. 392 F.3d at 1005. In Boylan, the Ninth  
14 Circuit held that the victims of a mail fraud scheme had  
15 sufficient Article III standing to contest the government's  
16 seizure of the funds because they were the beneficiaries of a  
17 constructive trust. Id. at 1004. The court reasoned that "when  
18 a fraudster acquires property from a victim by fraud, the  
19 fraudster holds the property in constructive trust for his  
20 victim." Id. Accordingly, the Ninth Circuit concluded that  
21 "[i]n the present case, the money fraudulently collected by [the  
22 fraudster] was impressed with a constructive trust. The United  
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24 <sup>5</sup> NAB asserts that the time of the cardholder's purchase is  
25 the relevant date for determining when its interest arose.  
26 (Opp'n at 13.) For the reasons given above, however, this  
assertion is incorrect. Neither NAB nor Global had a right to  
debit Red Rock's account until, at the earliest, the cardholder's  
chargeback requests was resolved in favor of the cardholder.

1 States, acquiring this property by alleging [the fraudster's]  
2 fraud, acquired it with the same trust imposed." Id.

3 NAB asserts that, like the claimants in Boylan, it is the  
4 beneficiary of a constructive trust because the funds were  
5 deposited into Red Rock's account as the result of "numerous and  
6 discrete illegal, fraudulent, or otherwise improper charges  
7 facilitated by Red Rock, LLC in furtherance of its scheme to  
8 defraud the cable operators." (Opp'n at 6; Verified Claim ¶ 6.)  
9 NAB was a direct victim of this fraudulent scheme, it contends,  
10 because Red Rock's improper submission of these illegal charges  
11 caused money to be credited wrongfully to Red Rock's account.  
12 (Opp'n at 7.)

13 NAB's reliance on Boylan and the constructive trust theory  
14 is misplaced. Its argument is premised on its assertion that it  
15 was the victim of Red Rock's fraudulent or illegal cable  
16 descrambler scheme. This characterization is not a fair  
17 representation of the situation. Unlike the plaintiffs in  
18 Boylan, NAB was not the target of the fraudulent scheme and did  
19 not part with money on the basis of false representations by a  
20 fraudster.<sup>6</sup> To the contrary, NAB was simply a financial  
21 intermediary that agreed to indemnify Global against potential  
22 chargeback losses.

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24 <sup>6</sup> In fact, NAB never directly deposited money into Red  
25 Rock's account as the result of any representation or  
26 communication by Red Rock. As NAB's counsel clarified at the  
hearing, it was Global who initially credited Red Rock's account.  
NAB simply indemnified Global and received the right to collect  
the chargeback reimbursements from Red Rock's account.

1        Rather than a victim, NAB was actually a conduit, albeit an  
2 unwitting one, through which the fraud was perpetuated on the  
3 scheme's target, the cable operators. In fact, prior to the  
4 government's seizure of the defendant funds, NAB actually  
5 benefitted from its relationship with Red Rock. Although NAB may  
6 be a victim of the forfeiture, that does not make it a direct  
7 victim or target of Red Rock's fraudulent or illegal scheme. The  
8 court does not read Boylan as extending standing to all third-  
9 party intermediaries or indemnitors who are indirectly harmed by  
10 criminal conduct. Accordingly, NAB lacks standing to bring its  
11 claim.

12 B. "Innocent Owner" Analysis

13        Even if NAB has standing, its claim fails because it cannot  
14 satisfy the "innocent owner" requirement of 18 U.S.C. § 983(d).  
15 The innocent owner inquiry is a separate and distinct inquiry  
16 from the Article III standing inquiry. United States v. Real  
17 Property Located at 5208 Los Franciscos Way, 385 F.3d 1187, 1191  
18 n.3. (9th Cir. 2004). Under § 983(d), the innocent owner  
19 requirements differ depending on whether the claimant's property  
20 interest in the seized asset was in existence when the illegal  
21 conduct giving rise to the forfeiture took place.

22        Where the claimant's property interest was in existence at  
23 the time of the illegal conduct, the term "innocent owner" means  
24 someone who: (1) did not know of the conduct giving rise to the  
25 forfeiture; or (2) upon learning of the conduct giving rise to  
26 the forfeiture, did all that reasonably could be expected under

1 the circumstances to terminate such use of the property. 18  
2 U.S.C. § 983(d) (2) (A). In contrast, where a claimant's property  
3 interest arises after the conduct giving rise to the forfeiture,  
4 a claimant must show that it: (1) is a bona fide purchaser or  
5 seller for value; and (2) it did not know and was reasonably  
6 without cause to believe that the property was subject to  
7 forfeiture. 18 U.S.C. § 983(d) (3) (A).

8 NAB does not contend that it was a bona fide purchaser.  
9 Therefore, to satisfy § 983(d), it must show that its property  
10 interest was in existence at the time the illegal conduct giving  
11 rise to forfeiture took place. NAB cannot make this showing.  
12 Whether based upon its contractual theory or its constructive  
13 trust theory, any property interest of NAB in the seized funds  
14 arose after the allegedly illegal sale of the cable descramblers.

15 NAB reiterates its argument that, under the MSA, it retained  
16 ownership of money deposited in Red Rock's account until the  
17 chargeback period expired. (Opp'n at 13-16.) It contends that  
18 it never ceased being the owner of the defendant funds and that  
19 its ownership interest, therefore, arose prior to the acts giving  
20 rise to the seizure. (Id.) However, for the reasons given  
21 above, any contractual interest in the property arose, at the  
22 earliest, when NAB became liable for the chargebacks and Global  
23 assigned NAB the right to collect the chargeback amount. This  
24 necessarily occurred after the sale of the cable descramblers.

25 NAB's attempted reliance upon the constructive trust theory  
26 is equally unhelpful. This theory is premised on the assumption

1 that a customer has purchased an illegal cable box descrambler,  
2 that a charge for the purchase has been incurred, and that funds  
3 have been placed in Red Rock's account. NAB claims ownership of  
4 these funds under the constructive trust theory precisely because  
5 they are the proceeds of the scheme to defraud cable operators,  
6 as alleged by the government. Accordingly, NAB's interest in the  
7 funds could not have arisen prior to the illegal acts giving rise  
8 to the forfeiture. See United States v. Hooper, 229 F.3d 818,  
9 821 (9th Cir. 2000) (holding that an property interest in  
10 criminal proceeds is necessarily acquired after the offense).  
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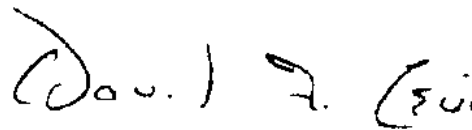
12 Therefore, NAB also fails to show that it is an "innocent  
13 owner" within the meaning of § 983(d).

14 III.

15 For the forgoing reasons, the government's motion is  
16 GRANTED.  
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18 IT IS SO ORDERED.

19 Dated: 8/19/2005  
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23 \_\_\_\_\_  
24 DAVID F. LEVI  
25 United States District Judge  
26